SINGAPORE REPORTS

Television Broadcasts Ltd & Ors v Golden Line Video & Marketing Pte Ltd

HIGH COURT (SINGAPORE) – SUIT NO 309 OF 1988 (S/C NO 1600/88)
CHAN SEK KEONG J
14 NOVEMBER 1988

Copyright – Plaintiffs copyright owners of cinematographic films and had exclusive right to authorize exhibition of the films on video tapes – Whether defendants had infringed plaintiffs' copyright by renting video tapes to the public without licence of plaintiffs – Video tapes not pirated copies – Whether statement of claim discloses reasonable cause of action – Application to strike out statement of claim – Copyright Act (Cap 63, 1985 Ed), ss 7, 83, 103(1), (2) & 105

The first plaintiffs were the copyright owners of certain cinematograph films and the second plaintiffs were the exclusive agents and licensees of the first plaintiffs for the granting of licences of the cinematograph films for territories outside Hong Kong. The third plaintiffs were the exclusive licensees of the films for Singapore and had, inter alia, the exclusive right to produce duplicates of the films on video tapes and to authorize the exhibition of the tapes by way of private let or hire for home use. The plaintiffs began an action against the defendants for infringing the copyright of the plaintiffs in that the defendants exposed or let for hire, without the licence of the plaintiffs, video tapes of the plaintiffs' films to members of the public. The defendants applied to the court to strike out the plaintiffs' statement of claim under O 18 r 19 of the Rules of the Supreme Court 1970 and/or under the inherent jurisdiction of the court on the ground that the statement of claim discloses no reasonable cause of action against the defendants.

Held, allowing the application:

(1) Nothing in s 83 of the Copyright Act (Cap 63, 1985 Ed) ('the Act') confers on the copyright owner of a cinematograph film an exclusive right to distribute it by way of sale or letting for hire. The rights of a copyright owner of a cinematograph film are those of reproduction, public performance, broadcasting and diffusion. Any person who does any of these acts in relation to a cinematograph film without the licence or authority of the copyright owner commits a direct infringement of copyright. Where a copy of a cinematograph film is made without the licence of the copyright owner and the pirated copy is dealt with in terms of s 105 of the Act, an indirect infringement of copyright occurs. However, the making of such a film for private and domestic use does not constitute an infringement of copyright.

(2) In the present action, the plaintiffs have not alleged in their pleadings that the video tapes were pirated copies but, instead, have admitted that the video tapes were non-infringing tapes. A purchaser of non-infringing copyright articles obtains full ownership of such articles although he does not obtain the copyright subsisting therein. Any dealings by him with such articles in the way of trade, whether for sale or hire, are not acts of infringement of copyright because the copyright owner has no exclusive right to any such dealings with such articles.

(3) The plaintiffs' claim against the defendants is wholly misconceived from the start. The statement of claim fails to disclose any cause of action since there is no claim that the video tapes were infringing tapes or a claim that the defendants have caused the video tapes to be seen in public.

[*Editorial Note*: The plaintiffs have appealed to the Court of Appeal vide Civil Appeal No 118 of 1988.]

Cases referred to

1 *Netage Pty Ltd* v *Cantley* (1985) (referred to in *Lahore: Intellectual Property in Australia*, Supplementary Service, 24 March 1986, para 332) (refd)
2 *CBS United Kingdom Ltd* v *Charmdale Record Distributors Ltd* [1980] 2 All ER 807 (distd)
3 *Barson Computers (NZ) Ltd* v *Gilbert (John) & Co* [1985] FSR 489 (distd)
4 *Time-Life International (Nederlands) BV* v *Interstate Parcel Express Co Pty Ltd* [1978] FSR 251 (refd)
5 *Performing Right Society* v *Harlequin Record Shops* [1979] FSR 233 (refd)
6 *Rank Film Production Ltd* v *Colins Dodds* [1983] 2 NSWLR 553 (refd)

Legislation referred to

Copyright Act (Cap 63, 1985 Ed) ss 7, 83, 103(1), (2), 105, 114
Copyright Act 1962 [NZ] s 10(2)
Copyright Act 1956 [UK] ss 2(5)(c), 5(2), 16(2)

Keh Kee Guan (*Miss Fok Jun Heng* with him) for the plaintiffs.
Tan Tee Jim for the defendants.

Cur Adv Vult

Chan Sek Keong J: This is an application by the defendants, inter alia, to strike out the statement of claim under O 18 r 19 of the Rules of the Supreme Court and/or under the inherent jurisdiction of the court on the ground that the statement of claim discloses no reasonable cause of action against the defendants.

This application was filed on 14 March 1988. Since then, ie on 2 September 1988, the plaintiffs have, pursuant to an order of court, filed an amended statement of claim. Accordingly, the application has been heard before me on the basis that it was an application to strike out the amended statement of claim.

It was agreed by counsel for the parties herein that should the defendants fail in this application, judgment would accordingly be entered against them in terms of the reliefs prayed for in the amended statement of claim but that should the defendants succeed, all other interlocutory applications made in this action should be dealt with accordingly.

For the purpose of this application, the parties have agreed to the following statement of agreed facts which reads:

(1) The first plaintiffs are a public limited company incorporated under the laws of Hongkong with a registered office at No 1, Hysan Avenue, 3rd Floor, Causeway Bay, Hongkong. They are the copyright owners of the cinematograph films (hereinafter re-

ferred to as 'the said films') identified in the schedule ('the said schedule') attached to the amended statement of claim filed herein. Copyright in the said films subsists in Singapore.

(2) The second plaintiffs are a company incorporated in Hongkong with a registered office at No 1, Hysan Avenue, 3rd Floor, Causeway Bay, Hongkong. They are the exclusive agents and licensees of the first plaintiffs for the granting of licences in respect of the said films for territories outside Hongkong by virtue of an agreement dated 1 June 1981 entered between the first and the second plaintiffs.

(3) The third plaintiffs are a company incorporated in Singapore with a registered office on the 1st Floor, Mandarin Theatre, 535, Kallang Bahru, Singapore 1233. They were at all material times the exclusive licensees of the said films for the territory of Singapore by virtue of an agreement dated 16 February 1987 (hereinafter referred to as 'the said agreement') entered into between the second and the third plaintiffs for the period 1 April 1987 and 31 March 1988.

(4) Under the said agreement, the third plaintiffs had the exclusive right to:
   (a) produce duplicates of the said films on video recording tapes;
   (b) exhibit and authorize the exhibition of the said films on video recording tape re-play machines by way of private let or hire for home use;
   (c) grant sub-licences to others, and
   (d) grant duplication licences to others with the consent of the second plaintiffs.

(5) The third plaintiffs had at the date of this action about 190 sub-licensees who were granted sub-licences to let out on hire copies of the said films to members of the public for private and domestic homeviewing. The sub-licensees were prohibited from reproducing or selling copies of the said films and were to ensure that copies rented out were not in turn re-hired out to third parties. The plaintiffs have not authorized any copies of the said films for sale in the open market.

(6) The first publication of the said films took place in Singapore. Copyright in the said films therefore subsists in Singapore and the first plaintiffs were and are at all material times the owners of the copyright so subsisting in the said films.

(7) Each copy of the said films released in Singapore as aforesaid has been censored and has attached thereto a videotape certificate issued by the Board of Film Censors which bears the name of the third plaintiffs (or their predecessors, Visionex) as owners and a notice on the casing stating as follows:

Notice

This video cassette tape has been specifically licensed to be let on hire for private and domestic homeviewing by an authorized sub-licensee of the sole and exclusive licensee – Crown Video (S) Pte Ltd. The letting out on hire or rental of this video cassette tape by any person other than an authorized sub-licensee constitutes an infringement of the rights of Crown Video (S) Pte Ltd and the copyright owners, Television Broadcasts Ltd (TVB).

(8) All copies of the said films contain the following warning notice on playback:

The film contained in this video cassette is distributed under licence from the copyright owners for private home use only. Any other use of such film or any part of it including but not limited to copying it, causing it to be seen or heard in public, broadcasting or carrying it to be transmitted to subscribers in a diffusion service, selling, hiring or otherwise dealing with it or any part of it without the written authority of the copyright owner is strictly prohibited.

(9) The defendants, who were at all material times not one of the sub-licensees of the third plaintiffs or of Visionex, let for hire copies of the following films: (a) The Turbulent Decade (b) The New Heaven Sword and Dragon Sabre (c) SIB File (here follows another 33 titles).

(10) All copies of the said films were made by and/or with the consent of the plaintiffs. Each of these copies has a Board of Film Censors certificate bearing the third plaintiffs' or Visionex's name as owners thereof.

(11) Four hundred and thirty five copies of the said films referred to in para 10 above were obtained by the defendants from Rising Video Pte Ltd ('Rising'), now of Blk 634, Veerasamy Road, #01-140, Singapore 0820. These copies were in turn obtained by Rising from the third plaintiffs and Visionex. Rising was a sub-licensee of the third plaintiffs from April 1987 to March 1988. The hiring out by the defendants of the copies of the said films as set out in para 9 above was made without authorization or consent of Rising.

In the course of arguments before me, counsel for the plaintiffs confirmed that the expression 'all copies' in para 10 of the statement of agreed facts meant the 1,090 video tapes and that all such tapes were made in Singapore by the third plaintiffs as sub-licensees of the second plaintiffs.

I have also recorded in my notes of arguments a statement by counsel for the plaintiffs that counsel for the defendants conceded that the defendants had allowed the video tapes to be shown in public for advertising and preview purposes, but I have no record of any admission or denial of this statement by counsel for the defendants.

This action was commenced on 12 February 1988 when the writ indorsed with a statement of claim was filed. On the same day, the plaintiffs applied for and obtained an interim injunction in the following terms:

That the defendants, whether by themselves, their directors, officers, servants or agents or any of them or otherwise

howsoever be restrained and an injunction be granted restraining them until further order from making, manufacturing, reproducing, selling or offering for sale or letting for hire, or by way of trade, offering or exposing for hire or sale or otherwise parting with possession, power or custody or control of or destroying or defacing or hiding or removing any copies or any substantial copies (whether in the form of video cassette tapes or otherwise) of the cinematograph films listed in the schedule hereto and of all other cinematograph films not listed in the schedule hereto and in which copyright subsists in Singapore and belong to the first plaintiffs herein.

The plaintiffs also obtained an Anton Piller order and an order for delivery of all infringing video tapes containing the cinematograph films to the plaintiffs within 24 hours. The Anton Piller order was executed on 15 March 1988 pursuant to which the 1,090 video tapes were seized into the custody of the plaintiffs' solicitors.

The ex parte application for the injunction and the Anton Piller order was supported by an affidavit affirmed on 11 February 1988 by the general manager of the third plaintiffs. The following paragraphs in the said affidavit contain the alleged acts of infringement of the defendants:

10 Sometime in January 1988, the plaintiffs received information that the defendants were exposing or otherwise letting out for rental copies of the said films without the plaintiffs' consent, licence or authority.

11 On or about 3 February 1988, the third plaintiffs by their representatives or agents *rented*, (my emphasis), inter alia, the following video cassette tapes containing copies of the following films from the defendants at their place of business as follows:

	Title	*Amount paid*	*Censor certificate no*	*Date rented*	*Address*
(a)	The Curtain Rises (Volume 1)	$2	2907441	3 Feb 1988	Blk 164 Stirling Road, #01-1218, S'pore 0314
(b)	The Curtain Rises (Volume 2)	$2	2909057	3 Feb 1988	Blk 164 Stirling Road, #01-1218, S'pore 0314

12 I have personally viewed the abovesaid tapes rented, which are attached hereto together with their copies and all are together with a copy of the receipt issued for the payment marked collectively as exh 'LKY8' and discovered that they are copies of the cinematograph films, of which the copyright belong to the first plaintiffs. I have also discovered that all the copies on playback contain the following:

(a) the warning notice as set out in para 7(f) above;
(b) the name and logo of the first and second plaintiffs.

13 On the spine of the said rented tapes, there is the logo of the second plaintiffs and their making thereof together with the title of the film produced by the first plaintiffs. Further on the top side of the casing, there is a certificate issued by the Board of Film Censors, Singapore and the name of the third plaintiffs is stated as owners. However, the notice in red referred to in para 7(e)(ii) in the foregoing has apparently been torn out.

14 The defendants knew or ought to have known of the plaintiffs' rights but persisted in the infringement of the plaintiffs' rights despite the repeated warnings and notices set out above and the various notices in the Singapore newspapers referring to the plaintiffs' entitlement to their rights and the plaintiffs' intentions to take proceedings to stem out infringement of their rights therein.

15 I verily believe that the defendants have in their possession, power, control or custody in their business premises at Blk 164, Stirling Road, 01-1218, Singapore 0314 or at such part thereof many more copies of the said films to which the copyright belong to the first plaintiffs including invoices, delivery orders, books of accounts, membership records as well as names and addresses of persons to whom they had *hired out or rented* (my emphasis) the copies of the said films and records as to the number of copies hired out without any of the plaintiffs' consent or licence and records of persons who supply them with such tapes. These items could and would easily be removed beyond this Honourable Court's jurisdiction and/or be destroyed or erased if the defendants were put on notice of this suit or any inter partes application the said films both in video cassette and other material forms are the very subject of this claim and would also render it impossible for the plaintiffs to levy execution to satisfy this Honourable Court's order as to damages in favour of the plaintiffs which this Honourable Court may decide at the trial of this action.

16 The plaintiffs are suffering and continue to suffer serious loss and damage in their trade by reason of the defendants' *unlawful misappropriation of their property rights* (my emphasis) and do verily believe that the defendants will continue with the infringement unless restrained by an order of court. Damages will not be an adequate remedy for the plaintiffs for the following reasons:

(a) losses suffered due to infringement of intellectual property are extremely difficult to quantify; and
(b) any infringement if not immediately stopped will damage the reputation and goodwill of the plaintiffs especially vis-à-vis their sub-licensees who may themselves be encouraged to indulge in this wrongful act which is extremely lucrative and easy to carry out.

It is clear from the statement of claim and the affidavit filed by the plaintiffs in support of the application for the interim injunction that the plaintiffs' action against the defendants for copyright infringement is founded upon and limited to the defendants having exposed or let for hire, without the licence of the plaintiffs, video tapes to members of the public. Subsequent discovery and seizure under the Anton Piller order show that the defendants have rented out some or all of the 1,090 video tapes from time to time.

There is no evidence as to how the defendants came to acquire the 1,090 video tapes and no question arises as to whether the defendants have good title to them.

Against this background, counsel for the defendants submitted that the only issue before the court on the pleadings is whether there was any infringement of the plaintiffs' copyright in the 36 films by the defendants

having let for hire of all or some of the 1,090 video tapes to members of the public without the licence of the plaintiffs.

Before I deal with this issue I should like to make some observations on copyright in cinematograph films. Until the coming into force on 10 April 1987 of the Copyright Act (Cap 63, 1985 Ed), there was no copyright in cinematograph films as such and the legal position is confirmed by s 220.

A cinematograph film is defined in s 7 of the Act to mean:

> the aggregate of visual images embodied in an article or thing so as to be capable by the use of that article or thing
>
> (a) of being shown as a moving picture; or
> (b) of being embodied in another article or thing by the use of which it can be so shown, and includes the aggregate of the sounds embodied in a sound-track associated with such visual images.

The definition is wide enough to include a video tape of the film: see *Netage Pty Ltd* v *Cantley*[1] referred to in *Lahore: Intellectual Property in Australia,* Supplementary Service, 24 March 1986 (para 332).

Section 83 of the Act provides that for the purposes of the Act, unless the contrary appears, copyright, in relation to a cinematograph film, is the exclusive right to do all or any of the following acts:

(a) to make a copy of the film;
(b) to cause the film, in so far as it consists of visual images, to be seen in public;
(c) to broadcast the film;
(d) to include the film in a cable programme.

When the Copyright Bill was referred to a Parliamentary Select Committee in May 1986, the Motion Picture Export Association of America Inc made a written submission to the Select Committee that s 83 should be amended to include the right to distribute, by sale or rental, copies of the cinematograph films (see p A6 of the Report of the Select Committee on the Copyright Bill, Parliament Report 9 of 1986). This submission was rejected by the committee (see p B43, ibid). It is therefore clear that nothing in s 83 confers on the copyright owner of a cinematograph film an exclusive right to distribute it by way of sale or letting for hire.

In short, the rights of a copyright owner of a cinematograph film are those of reproduction, public performance, broadcasting and diffusion. Copyright in a cinematograph film does not extend beyond these rights. Section 83, in qualifying these rights by the use of the expression 'unless the contrary appears', appears to provide for the possibility that in the context of a particular statutory provision, some of these rights may even be diminished or nullified.

Any person who does any of these acts in relation to a cinematograph film without the licence or authority of the copyright owner commits a direct infringement of copyright. Where a copy of a cinematograph film is made without the licence of the copyright owner and the pirated copy is dealt with in terms of s 105 of the Act, an indirect infringement of copyright occurs. However, the making of such a film for private and domestic use does not constitute an infringement of copyright – see s 114.

In the present action, the plaintiffs have not alleged in their pleadings that the 1,090 video tapes were pirated copies, ie made without their licence. On the contrary, in the agreed statement of facts and during argument, they have admitted that the 1,090 video tapes were non-infringing tapes. Their case as pleaded was that the letting for hire of these tapes was, ipso facto, an infringement of copyright.

At the commencement of the hearing, counsel for the defendants did not appear to have been aware that the 1,090 video tapes were non-infringing copies. He accordingly put forward the contention that the defendants had no knowledge of and had no reason to know that any of the 1,090 video tapes was an infringing copy as each of them had, pasted to it, a Board of Film Censors certificate bearing the third defendants' or their predecessors' name as owners. He relied on s 105 of the Act as providing a complete defence to the action.

Section 105 of the Act provides as follows:

> (1) A copyright subsisting by virtue of this Part is infringed by a person who, in Singapore, and without the licence of the owner of the copyright –
>
> (a) sells, lets for hire, or by way of trade offers or exposes for sale or hire, an article; or
> (b) by way of trade exhibits an article in public,
>
> where he knows, or ought reasonably to know, that the making of the article constituted an infringement of the copyright or, in the case of an imported article, the making of the article was carried out without the consent of the owner of the copyright.
>
> (2) For the purposes of subsection (1), the distribution of any articles –
>
> (a) for the purpose of trade; or
> (b) for any other purpose to an extent that affects prejudicially the owners of the copyright concerned,
>
> shall be taken to be the sale of those articles.

Counsel referred to the decision in *CBS United Kingdom Ltd* v *Charmdale Record Distributors Ltd*[2] where Browne-Wilkinson J (now Vice-Chancellor) decided that the expression 'made' in relation to imported articles under s 16(2) of the Copyright Act 1956 (in which the material words were 'or would have constituted such an infringement if the article had been made in the place into which it is so imported') referred to the actual maker who, in that case, was abroad. This decision, as pointed out by

counsel for the plaintiffs, was not followed in a New Zealand High Court decision, *Barson Computers (NZ) Ltd* v *Gilbert John Co*,[3] where Pritchard J held that the same expression in the equivalent section of the New Zealand Copyright Act 1962 referred not to the actual maker abroad but to any maker who, if he had made that article in the country into which it was imported (ie New Zealand in that case), would have committed an infringement of copyright.

These two decisions with their conflicting interpretations are not relevant to the present case for two reasons: firstly, they were concerned with the meaning of 'made' in respect of imported articles. In the present case, the 1,090 video tapes were not imported articles as they were made in Singapore by the third plaintiffs and the question of a hypothetical maker for the purposes of s 105(1) did not arise and could not arise. This leads me to the second reason, which is that the relevant words in the second part of s 105(1) in relation to an imported article are 'the *making of the article was carried out* without the consent of the owner of the copyright' (my emphasis). These words, as a matter of grammatical construction, are a clear reference to the actual making of the article before it is imported into Singapore. An actual making must imply an actual maker and that maker must also be abroad. The formula in s 105(1) in the case of imported articles is significantly different from that in s 10(2) of the Copyright Act 1962 of New Zealand or s 5(2) of the Copyright Act 1956 of the United Kingdom. It would therefore appear that in the area of copyright protection our legislature has adopted a mercantile policy of allowing in Singapore a free market where copyright articles, whether parallel imports or made under licence in Singapore, may be sold or dealt with in competition with one another.

To revert to the only issue in this action, counsel for the plaintiffs conceded that as the 1,090 video tapes were non-infringing tapes, the defendants had not committed an indirect infringement of copyright. There is no such tort in law. He, however, changed the direction of his attack by submitting that although the defendants as owners of the video tapes were entitled to use them in any way they pleased, they were not entitled to use them in a way which infringed any copyright of the plaintiffs in the said tapes. This proposition of law is affirmed in *Time-Life International (Nederlands) BV* v *Interstate Parcel Express Co Pty Ltd*.[4] In other words, the fact that the defendants had not committed an indirect infringement of the plaintiffs' copyright did not meant that they had not committed a direct infringement of such copyright. It was pointed out that s 103(2) of the Act specifically provides that:

> Sections 104 and 105 shall not affect the generality of sub-s (1).

ie section 103(1), which provides as follows:

> Subject to the provisions of this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Singapore, or authorizes the doing in Singapore of, any act comprised in the copyright.

The contention of counsel for the plaintiffs in this respect is that the defendants have directly infringed the plaintiffs' copyright in the cinematograph films by causing the video tapes to be seen in public, ie they have allowed potential customers to preview the video films to allow them to decide whether or not to hire the tapes. The facts relied upon by the plaintiffs were (i) the showing by the defendants of the films on the television screen in their shop and (ii) the hiring out of the video tapes to members of the public for viewing.

Counsel for the plaintiffs referred me to two decisions on the meaning of the expression 'in public' in the context of copyright legislation.

In *Performing Right Society* v *Harlequin Record Shops*,[5] Browne-Wilkinson J (now Vice-Chancellor) considered the meaning of performance 'in public' within s 2(5)(c) of the Copyright Act 1956. His Lordship held that a performance (in that case, the playing of records in record shops) given to an audience consisting of persons present in a shop which the public at large are permitted or encouraged to enter without payment or invitation with a view to increasing the shopowner's profit is a performance in public. Similarly, in *Rank Film Production Ltd* v *Colins Dodds*,[6] the exhibition of video tape movies by the occupier of a motel rooms by means of transmission by a video cassette recorder to a recording apparatus in the rooms amounted to causing the film to be seen in public and thus an infringement of copyright in those films when done without the licence of the copyright owners, under the equivalent provisions of the Copyright Act 1968 of Australia.

Counsel for the defendants has not denied making the alleged admission but has argued that the plaintiffs have made no such allegation in their pleadings nor have the plaintiffs sought to mention in the agreed statement of claim that each of the video films was in fact screened for public viewing prior to their letting for hire. By putting forward this argument, I can only assume that counsel for the defendants is either denying the admission altogether or the purpose of such admission.

I do not wish to adjudicate on this issue, ie whether or not counsel for the defendants had made such an admission as I am of the view that even if he did, it had no relevance to the subject matter of the application, which is whether or not the amended statement of claim discloses a reasonable cause of action when it alleges that the defendants have infringed the plaintiffs' copyright in

the said 32 films by letting for hire some or all of the 1,090 tapes without their consent.

The answer is plainly no. A purchaser of non-infringing copyright articles obtains full ownership of such articles although he does not obtain the copyright subsisting therein: *Time-Life International (Nederlands) BV* v *Interstate Parcel Express Co Pty Ltd*,[4] at pp 262-263. Any dealings by him with such articles in the way of trade, whether for sale or hire, are not acts of infringement of copyright because the copyright owner has no exclusive right to any such dealings with such articles.

It is therefore clear that the plaintiffs' claim against the defendants were wholly misconceived from the start. Even without the statement of agreed facts, both the statement of claim and the amended statement of claim failed to disclose any cause of action since in neither of them was there a claim that the video tapes were infringing tapes or a claim that the defendants have caused the video tapes to be seen in public.

Accordingly, there will be an order in terms of the application with costs.

Application allowed.

Solicitors: *Keh Kee Guan & Co*; *Donaldson & Burkinshaw*.

Reported by *Ng Sheau Jiuan*

Elia bte Hussein Ahmad Salim bin Taib & Ors v Hong Kong Bank Trustee (Singapore) Ltd

HIGH COURT (SINGAPORE) – ORIGINATING SUMMONS NO 889 OF 1988
CHAO HICK TIN JC
14 NOVEMBER 1988

Trusts and Trustees – Beneficiary-trustee removed as trustee of settlement as a result of unauthorized investments made – Order of court stating that defaulting trustee shall not receive any income under the settlement – Trust of beneficiary-trustee's life interest failed as a consequence of court order – Discretionary trust for benefit of beneficiary-trustee's family under discretionary trust – Whether trustee's discretion to grant maintenance and support an absolute one

By an indenture, certain immovable properties were conveyed to trustees who were to hold the settled properties upon trust for the settlor during his life and the net income of the settled properties upon trusts for the sons and daughters of the settlor after his death. As a result of certain unauthorized investments, H (one of the trustees of the settlement) was removed as a trustee by an order of court dated 22 July 1986. Under para 10 of the order of court, it was ordered that 'none of the defaulting trustees shall be entitled as a beneficiary under the settlement to receive any income arising under the settlement ...'. In consequence of this event, the trust of a life interest in favour of H failed or determined in accordance with cl 4(1) of the indenture and a discretionary trust set out in cl 4(2) came into operation. Clause 4(2) of the indenture stated that 'if the trust fails or determines during the life of the principal beneficiary, then during the residue of his or her life ... such share of the net income shall be held upon trust for the application for the maintenance or support ... of (a) ... the wife ... and his or her children ...'.

The plaintiffs, who were the wife and children of H, applied to the court for maintenance and support under this discretionary trust. The defendants, who were the present trustees of the settlement, contended that the plaintiffs were not entitled to any maintenance or support under cl 4(2) of the indenture for the following reasons: (a) para 10 of the court order of 22 July 1986 forbade that; (b) H had not made good the amount he owed the settlement and was therefore not entitled to any payment until the default was remedied. As such, there is nothing that is being held upon trust for the plaintiffs and cl 4(2) does not come into effect; (c) the defendants' discretion as trustees under cl 4(2) was an absolute one.

Held, allowing the application:

(1) The court order of 22 July 1986 restrains the defaulting trustees from receiving any income as a beneficiary. It in no way affects the rights or entitlement of others like those of a spouse or children of such a principal beneficiary following the failure or determination of the life interest of the principal beneficiary.

(2) The court order of 22 July 1986 deprived H of his right to receive his share of the net income. In consequence thereof, the trust set out in cl 4(2)(a) arises, which is basically for the benefit of the family of a principal beneficiary. The very object of such a secondary trust is for the welfare and support of the children and remoter issues of the settlors, and not to punish the remoter issues with the sins of their father or mother.

(3) That part of the provision in cl 4(2)(b) commencing with the words 'as the trustees in their absolute discretion ...' until the end of that provision should qualify both cl 4(2)(a) and (b) rather than just (b).

(4) The trustees' discretion whether to grant maintenance or support under cl 4(2) is not an absolute one. The discretion lies in deciding which of the persons the trustees think most deserve a grant of maintenance or support. It does not go to the extent of giving the trustees the discretion to withhold maintenance or support altogether to any of that class of persons.

Cases referred to

1 *Re Balfour's Settlement* [1938] Ch 928 (refd)
2 *Re Dacre* [1916] 1 Ch 344 (distd)
3 *Re Eiser's Will Trusts* [1937] 1 All ER 244 (folld)

Legislation referred to

Trustees Act (Cap 336, 1985 Ed) s 38(1)(b)

Aloysius Leng for the plaintiffs.
Koh Juay Kherng for the defendants.

Cur Adv Vult

Chao Hick Tin JC : This is an application by the wife and two children of a former beneficiary-trustee, one Hussein Ahmad Salim bin Talib (hereinafter called 'Hus-